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February 23, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20008

Re: **In The Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, CS Docket No. 97-248, RM No. 9097**

Dear Ms. Salas:

On behalf of EchoStar Communications Corporation ("EchoStar"), enclosed for filing is an original and six copies of EchoStar's Reply Comments in the above-referenced matter.

Also enclosed is an additional copy of EchoStar's Reply comments which we ask that you date stamp and return to our messenger.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Marc A. Paul

Marc A. Paul

Counsel for EchoStar Communications Corporation

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 97-248
	)	RM No. 9097
Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY COMMENTS OF ECHOSTAR COMMUNICATIONS CORPORATION

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Dated: February 23, 1998

SUMMARY

EchoStar Communications Corporation ("EchoStar") hereby files these Reply Comments in response to the Comments filed in the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter. In its Fourth Annual Report, the Commission expressed its frustration at the development of competition in the MVPD marketplace:

> The cable industry continues to occupy the dominant position in the MVPD marketplace. . . . The cable industry's large share of the MVPD audience . . . reflects an inability of consumers to switch to some comparable source of video programming.[1]

The Commission continued that "[l]ocal markets for the delivery of video programming generally remain highly concentrated and continue to be characterized by some barriers to entry and expansion by potential competitors to incumbent cable systems."[2] According to the Commission, competition is developing slowly:

> [c]able operators continue to be the main distributors of multichannel video programming, serving 87% of total MVPD subscribers. . . .[D]espite the inroads non-cable MVPDs have made in subscriber penetration, the largest cable MSOs remain the largest MVPDs.[3]

The Program Access NPRM could not come at a better time. Even within the constraints of its statutory mandate, the Commission can diminish the "obstacles" that have been put in the way of

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[1] In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, FCC 97-423 at ¶¶ 7-8 (1998) ("Fourth Annual Report").

[2] Id. at ¶ 11.

[3] Id. at ¶ 150.

MVPD competition: modify the program access rules, so they act as a real deterrent to discrimination and unfair practices of cable operators and their affiliated program vendors. In fact, the limited reach of the statutory provisions makes it imperative that the Commission enforce these rules to their fullest breadth.[4]

Significant support exists for the following revisions to the Commission's program access rules:

First, the Commission must permit discovery as of right in program access complaints. As EchoStar emphasized in its comments and other commenters agreed, complainants are at a unique disadvantage in program access disputes since most of the proof of rules violations is generally in the sole custody of the defendant program vendors and their cable operator affiliates. Permitting discovery as of right will deter rule violations before they occur since vendors would no longer be able to hide the very agreements which demonstrate a program access violation.

Second, the Commission must impose damages upon companies found to violate the program access rules. The remedies the Commission has imposed so far have not been a sufficient deterrent to rule violations. In addition, the remedies do nothing to address the anti-competitive harm suffered by the victims of program access violations. The imposition of damages will impose a real cost on violators of the program access rules, thereby deterring violations before they occur.

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[4] At the same time, the requested reforms, while necessary are, not adequate to alleviate all the competitive problems affecting the Multi-Channel Video Programming Distribution ("MVPD") market.

Third, the Commission must prevent evasion of the program access rules by use of terrestrial facilities for the delivery of cable-affiliated programming. Commenters have observed a disturbing trend in program delivery: cable vendors are choosing to deliver their programming through terrestrial mechanisms, like fiber, in an apparent effort to avoid the reach of the program access rules. The Commission has the authority to prevent such evasion and secure the integrity of the existing rules.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage	CS Docket No. 97-248 RM No. 9097

REPLY COMMENTS OF ECHOSTAR COMMUNICATIONS CORPORATION

EchoStar Communications Corporation ("EchoStar") hereby files these Reply Comments in response to the Comments filed in the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter.[1] Significant support exists for the following revisions to the Commission's program access rules: (1) permit discovery as of right in program access complaints; (2) impose damages upon companies found to violate the program

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[1] Implementation of the Cable Television Consumer Protection and Competition Act of 1992/Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CS Docket No. 97-248, RM No. 9097 (rel. Dec. 18, 1997) ("Program Access NPRM").

access rules; and (3) prevent evasion of the program access rules by use of terrestrial facilities for the delivery of programming.

I. COMMENTERS SUPPORT DISCOVERY AS OF RIGHT FOR PROGRAM ACCESS COMPLAINTS

In its initial comments, EchoStar pointed out that discovery in program access proceedings is often necessary for determining whether a program access violation had occurred and crucial to gauging the extent of such a violation.[2] With most of the information relevant to determining a violation in the hands of cable operators and programmers, discovery is needed if the Commission and complainants are to make a reasoned determination as to the existence of discrimination and its extent.

Numerous commenters agree with this position.[3] Like EchoStar, commenters recognize that under the current rules of virtually no discovery and voluntary disclosure of documents, there is no incentive for a defendant to produce its programming contracts or other rate information during negotiations. In the words of GTE:

> In program access matters, essentially all of the facts necessary to just resolution of the complaint will be in the exclusive control of the cable-affiliated programming vendor. Absent a complainant's right to conduct necessary discovery, such programming vendors have utterly no incentive to cooperate with the adjudicatory process. On the contrary, they have every incentive to obstruct the process by limiting access to the information which a new entrant

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2 EchoStar Comments at 3.

3 See, e.g., Comments of DirecTV at 25; Comments of RCN Telecom Services, Inc. at 6; Comments of Optel Inc. at 3; Comments of GTE at 9; Comments of Bell Atlantic at 4.

> complainant needs to make its case and which the Commission requires to fairly adjudicate the matter.[4]

Discovery as of right would change these incentives, and "foster competition in the video marketplace" by ensuring access to information that is critical to establishing a price discrimination case.[5]

Objections to discovery as of right predictably come from the custodians of the necessary information – cable operators and affiliated vendors. They claim that such discovery would: (1) only result in time-consuming fishing expeditions; (2) discourage negotiations; and (3) result in disclosure of sensitive business information.[6] Cable operators and affiliated vendors are the potential defendants to program access complaints and they obviously do not like the existence of the process. Short of obtaining its abolition, they would have it be as ineffective as possible. They accordingly raise the objection frequently raised by defendants in proceedings that turn on facts – the risk of fishing expeditions. Naturally, that objection may in some cases be legitimate and it should be dealt with and addressed, on a case by case basis, through

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4 Comments of GTE at 9. See also Comments of Bell Atlantic at 5 ("Knowledge of rates charged by the program access defendant to other multichannel video programming distributors (MVPDs) is information that a complainant rarely can obtain absent discovery, because vertically-integrated programmers are not required to disclose the terms of their contracts publicly.").

5 Comments of RCN Telecom Services, Inc. at 6 ("Discovery is an important tool that the Commission should use to foster competition in the video marketplace.").

6 See Comments of Liberty Media Corp. at 7; Comments of Comcast Corporation at 5; Comments of Home Box Office at 9; Comments of National Cable Television Association at 8-9; Comments of Cablevision Systems Corporation at 25; Comments of Time Warner Cable at 5.

oppositions to motions to compel. But it cannot be used by a defendant class to preempt all discovery, thwart fact-finding and deprive the process of its effectiveness. The Federal Rules of Civil Procedure can adequately dispel the alleged fears of intrusiveness and harassment.[7]

Indeed, rather than slowing down the program access complaint process, discovery as of right may in fact speed it up. The disclosure of documents may help to focus the Commission on the issues and quickly provide it with the information needed to make an informed decision.[8] Discovery may also conclusively demonstrate and highlight whether there is or is not a program access violation.

Further, discovery may in fact encourage, not discourage, negotiations among disagreeing parties. Under the current system of limited or no discovery, a cable operator or programmer that has violated the program access law has every incentive not to negotiate in good faith. With the real threat that an incriminating document may be revealed through discovery, however, the incentives change, and a defendant could be encouraged to settle the matter prior to the filing of a complaint.[9] Indeed, an effective program access process,

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7 See Comments of EchoStar at 5. See FRCP 26(e).

8 See Comments of RCN Telecom Services, Inc. at 7 ("In many cases, a review of the discovered information would make obvious that discrimination had occurred and the complaint could quickly be resolved.").

9 See Comments of RCN Telecom Services, Inc. at 7 ("[D]iscovery as of right would have the effect of discouraging discriminatory acts in the first instance because cable operators would be aware that their discriminatory behavior would be revealed.").

accompanied by discovery as of right, could encourage successful negotiations without need to resort to a complaint proceeding in the first place.

Finally, as proposed in the Program Access NPRM, a protective order can adequately allay concerns over the disclosure of sensitive business information.[10] The Commission and virtually all other fact-finding agencies and courts have routinely and successfully used protective orders to protect such information. There is no reason to believe that the use of these orders with respect to program access complaints would be any less successful.

II. COMMENTERS SUPPORT THE USE OF DAMAGES AS A DETERRENT TO PROGRAM ACCESS VIOLATIONS AND AS A WAY TO ADDRESS HARM SUFFERED BY MVPDS

A. The Damages Remedy is Necessary for Program Access Cases

Commenters have called for the award of damages in program access complaints.[11] The threat and imposition of damages: (1) stops wrongful conduct before it is

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10 See Program Access NPRM at ¶ 43.

11 See, e.g., Comments of RCN Telecom Services, Inc. at 8 ("The imposition of meaningful penalties is a necessary component of successful enforcement of the rules."); Comments of Bell Atlantic at 7 ("Only an award of damages to the competitor would offset the economic and competitive gains to defendant of engaging in the unlawful behavior."); Comments of DirecTV at 23 ("Prospective injunctive relief simply does not return an alternative MVPD that has unfairly been denied access to programming or been forced to take programming at inflated prices or under discriminatory terms or conditions to the competitive position it maintained prior to the unlawful tactics of the incumbent cable operator or its affiliated programmer."); Comments of Ameritech New Media, Inc. at 9; Comments of SNET Personal Vision, Inc. at 4 ("The Commission's arsenal of economic penalties should include both an ability to levy

(Continued...)

committed; and (2) compensates victims of program access violations for the anti-competitive harm suffered. Because the Commission's current remedies are prospective and do little to hold cable operators and programmers accountable for their past anti-competitive conduct, cable operators and programmers have a financial incentive to violate the program access law until they are ordered by the Commission to do otherwise.

Some commenters argue there is no need for improving deterrence in light of the number of resolved and pending program access complaints before the Commission.[12] The Commission should not be misled by the use of figures setting forth the number of program access complaints. Currently pending before the Commission are at least **four** program access complaints with evidence of serious violations of the Commission's rules. Indeed, the number of proceedings featuring the same defendants, and the existence of repeat offenders, is more illustrative of the limited effectiveness of the rules. One of the pending complaints involves a cable programmer, Rainbow Media Holdings, Inc., which has already been found to have violated the program access law **twice** before. Further, the fact that 60% of program access complaints have been settled should not provide the Commission with comfort that its rules are

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monetary forfeitures and an ability to award damages, and the agency should make plain that it will not hesitate to use both tools.").

12 See Comments of Liberty Media Corp. at 14; Comcast Corporation at 7; Comments of Home Box Office at 18; Comments of the National Cable Television Association at 10; Comments of Time Warner Cable at 6.

not being violated, or that its remedies are sufficient to deter prohibited conduct. As OpTel, Inc. indicated in its comments:

> Although OpTel was ultimately able to settle its programming disputes, these cases should not be regarded as evidence that the rules are working effectively. In fact, at the end of the process, the settlements OpTel obtained only afforded it the right to purchase and distribute the programming at issue. OpTel was never made whole for the damage done to it while the programming was withheld, and its subscribers were in no sense compensated for the programming services that they had been denied.[13]

While some commenters believe that forfeitures/penalties are sufficient, EchoStar disagrees. First, as RCN Telecom Services, Inc. observes, a $7,500 per day forfeiture is an inadequate deterrent since it is likely to be

> considered a cost of doing business to a cable operator with annual revenue of $106,000,000 to $5,860,000,000. To underscore the paltriness of this penalty, the guideline amount of $7,500 per violation is approximately one millionth (.0001%) of $5,860,000,000, TCI Communications' annual revenue. For this small price, a cable operator could smother competition and continue to dominate the market, gaining subscriber revenue in perpetuity.[14]

Furthermore, forfeitures are rarely imposed by the Commission, making them less than a meaningful deterrent to discriminatory conduct. Regularly imposed damages, however, would significantly increase the "cost" of committing a program access violation, and as a result, deter the violation of the program access rules.

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13 Comments of OpTel, Inc. at 2.

14 Comments of RCN Telecom Services, Inc. at 9; see also Comments of GTE at 11-12.

Moreover, forfeitures and other prospective remedies do nothing to make a complainant "whole" after the Commission ascertains a violation.[15] MVPDs that have been subject to discriminatory and anticompetitive conduct have suffered real competitive harm that must be remedied if there is to be a competitive MVPD marketplace. Otherwise, the anti-competitive effects of violating the program access law will linger long after the violation has occurred, even if it is punished by prospective remedies or forfeitures. The Commission should assess damages from the date of the program access violation, as opposed to the date of notification or the date the complaint is filed.[16] By calculating damages from this date, the entity found to have violated the program access law is held accountable for each and every day of its anti-competitive conduct.

B. The Commission Has The Authority to Impose Damages

Through its authority to impose "appropriate remedies" in Section 628(e), the Communications Act gives the Commission the authority to impose a damage remedy on violators of the program access law. The Commission correctly recognized this authority in its

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[15] Comments of Bell Atlantic at 7 ("Forfeiture penalties alone . . . would be an inadequate deterrent, because they do not reflect the full economic and competitive damage the unlawful behavior inflicts on its competitors."); see also Comments of National Rural Telecommunications Cooperative at 5.

[16] See EchoStar Comments at 9-10; GTE Comments at 12; BellSouth Comments at 19.

reconsideration of the Program Access Report and Order.[17] Many commenters support the Commission's analysis.[18]

A few commenters, however, try to read too narrowly the statutory authorization of "appropriate remedies" in Section 628(e)(1).[19] As explained above, the damage remedy is "appropriate," indeed necessary, and the Commission should stand by its earlier conclusion that a damages remedy is within its authority in Section 628(e). Indeed, the use of a damages remedy would enhance the legislative intent of creating a competitive MVPD marketplace, deterring discriminatory conduct, and ensuring that successful complainants are made whole.[20]

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17 Implementation of the Cable Television Consumer Protection and Competition Act of 1992/Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, 1911 (1994) ("Program Access Reconsideration Order").

18 See EchoStar Comments at 7. See also Comments of DirecTV at 23; Comments of Bell Atlantic at 6; Comments of Ameritech New Media, Inc. at 18; Joint Comments of American Programming Service, Inc.; Consumer Satellite Systems, Inc.; Programmers Clearing House, Inc.; Satellite Receivers, Ltd.; and Satellite Distributors Cooperative at 12-13.

19 See Comments of Liberty Media Corp. at 19.

20 See Health Insurance Assn. of America, Inc. v. Shalala, 23 F.3d 412, 416 (D.C. Cir. 1994)("[R]eview of an agency's construction of an ambiguous statute is review of the agency's policy judgments. While we are to defer to those judgments, we cannot accept them if they seem wholly unsupported or if they conflict with the policy judgments that undergird the statutory scheme."), cert denied, 513 U.S. 1147 (1995).

C. A Damages Remedy Will Not Slow Down The Commission's Processes

Some commenters believe that damages awards will slow down the Commission's processing of program access complaints.[21] EchoStar believes that the proposal to bifurcate the liability and damages portion of a program access complaint addresses this concern.[22] With discretionary bifurcation, the Commission can defer a damages calculation until after determining liability. Accordingly, a damages award will not unnecessarily delay the resolution of a program access complaint.

Finally, some object that certain program access violations do not require a showing of injury in order to demonstrate a violation.[23] Clearly, however, a damage award would require proof of injury, mooting their objection. Injury would be proven either at the liability stage (if "effect" is a component of the particular violation alleged) or else at the damage stage (if bifurcated).

D. The Commission Should Apply Its Damages Remedy To Pending Program Access Cases

In its comments, EchoStar pointed out that the Commission should apply its damages remedy to pending program access complaints to the extent the Commission determines

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[21] See Comments of Liberty Media Corp. at 17; National Cable Television Association at 11; Comments of Home Box Office at 20; Comments of Time Warner Cable at 6.

[22] EchoStar Comments at 12 n.21. See also Comments of Bell Atlantic at 6; Comments of Optel, Inc. at 4.

liability in those cases.[24] The award of damages would not (as some may argue) involve the retroactive application of a new rule. Rather, the Commission will simply be exercising its pre-existing statutory authority. The Communications Act specifically gives the Commission the authority to determine "appropriate" remedies (which the Commission has correctly concluded includes damages) "upon completion of [an] adjudicatory proceeding."[25] Indeed, even if one were to regard the assessment of damages upon pending defendants as somehow "retroactive," it is within the authority of an agency to act "retroactively" through adjudication.[26]

III. COMMENTERS AGREE THAT THE COMMISSION MUST ADOPT REGULATIONS TO DETER THE EVASION OF THE PROGRAM ACCESS RULES BY OFFERING PROGRAMMING OVER TERRESTRIAL FACILITIES

Commenters share EchoStar's concern that affiliated vendors increasingly resort to terrestrial transmission of programming in an apparent effort to avoid the program access rules.[27] Contrary to the claims of some, evasion is a current concern, and not a problem the

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23 See Comments of National Cable Television Association at 11-12.

24 See EchoStar Comments at 8-9.

25 47 U.S.C. § 548(e) (emphasis supplied).

26 See SEC v. Chenery Corp., 332 U.S. 194, 202 (1947)("Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order.").

27 EchoStar Comments at 12; Comments of SNET Personal Vision, Inc. at 5; Comments of National Rural Telecommunications Cooperative at 16; Comments of Bell Atlantic at 9;

(Continued...)

Commission **may** have to address in the future.[28] Commenters have noted, for example, the recent conduct of Comcast Corporation and Cablevision Systems Corporation.

As EchoStar has shown, the Commission has the authority to prevent the evasion of its rules.[29] Further, as pointed out in the other comments, the Commission has correctly concluded that Section 628(b) is a repository of jurisdiction for the Commission to address "unfair practices," such as the evasion of its rules.[30] DirecTV correctly argues that there is "ample authority . . . to construe Section 628(c) as also prohibiting the type of conduct involved when a cable operator discriminates against or refuses to sell formerly satellite-delivered

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Comments of Ameritech New Media, Inc. at 24; Comments of Media Access Project at 3; Comments of DirecTV at 9; Comments of RCN Telecom Services, Inc. at 12.

28 See EchoStar Comments at 12. See also Comments of Bell Atlantic at 10 ("This is not a mere fanciful concern. . . .In short, Cablevision is moving its most valuable and popular regional sports programming channels in New York from satellite-based delivery to terrestrially-based delivery for the express purpose and with the express effect of preventing competing multichannel video programming distributors from providing that programming to their subscribers."); Comments of DirecTV at 11 ("Comcast's actions have directly and deliberately resulted in the disenfranchisement of some 43,000 Philadelphia-area residents from accessing Philadelphia-area sports on DirecTV, as well as more than 100 Philadelphia-area commercial establishments and hundreds of thousands of DirecTV subscribers purchasing out-of-market sports packages.").

29 See EchoStar Comments at 12-14.

30 See EchoStar Comments at 13-14; Comments of Media Access Project at 4; Comments of DirecTV at 13; Comments of National Rural Telecommunications Cooperative at 16; Comments of Bell Atlantic at 9; Comments of RCN Telecom Services at 12.

programming to a class of MVPD competitors."[31] The supplemental authority set forth in Sections 4(i) and 303(r) further provide that the Commission is permitted, as necessary, to adopt regulations which ensure that the statutory purpose of the program access law is achieved.[32]

Even the cable operators and programmers recognize that a desire to provide programming on a terrestrial basis can be motivated by either a legitimate or illegitimate business purpose – i.e., to avoid the reach of the program access rules.[33] EchoStar agrees, and also observes that the facts as to a particular vendor's motives are within the exclusive custody of the cable programmer.[34] As a result, to ensure that the decision to provide programming on a terrestrial basis is motivated by a "legitimate, economically justified (i.e., "fair") business

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[31] Comments of DirecTV at 18. In particular, DirecTV correctly observes that programming which was once "satellite cable programming" and would have remained "satellite cable programming" but for the "deliberate" shift to terrestrial delivery to evade the program access rules, should continue to be regarded as "satellite cable programming" for purposes of the program access rules. Id.

[32] See Comments of Ameritech New Media, Inc. at 25 ("[I]f it can be proven that the programming in question is provided terrestrially *for the purpose* of evading Section 628, and the conduct at issue would violate Section 628 were the programming satellite delivered, the Commission's broad powers pursuant to 4(i) and 303(r) would enable it to redress such violations."); Comments of SNET Personal Vision, Inc. at 5; Comments of GE American Communications, Inc. at 9 ("In United States v. Southwestern Cable Co., for example, the Supreme Court found with regard to the Commission's regulation of cable television that Section 4(i) conferred on the Commission the authority to adjust its regulations when needed to accommodate on-going changes in communications technology.")

[33] See, e.g., Comments of National Cable Television Association at 15 (indicating that where a "programmer has legitimate business reasons for switching to terrestrial delivery, there is no basis for treating the switch as an unfair method of competition or an unfair practice.").

[34] See EchoStar Comments at 15.

purpose," EchoStar proposes that the Commission adopt a rebuttable presumption that the primary purpose of using terrestrial facilities in lieu of satellite feeds is evasive unless proven otherwise.[35] Accordingly, the burden should be on the programmer to explain and justify its use of a more expensive technology. This presumption should apply not only to programming that is moved from satellite to terrestrial delivery, but programming initially provided on a terrestrial basis as well.[36] Finally, even in cases where the vendor proves fiber transmission to be more efficient, the Commission should still presume an evasive motive if the affected MVPD distributor offers to reimburse the vendor for any achieved cost saving. Such an offer would

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[35] See EchoStar Comments at 14-15. Commenters may argue that the Commission is not authorized to impose such a rebuttable presumption without specific evidence that terrestrial delivery is being undertaken to evade the program access rules. It is, however, axiomatic under federal administrative law that an agency has the power to resolve general factual issues by rulemaking rather than by considering specific evidence, when the questions under consideration are not unique to the particular case. See Mobil Oil Exploration & Producing S.E., Inc. v. United Distribution Cos., 498 U.S. 211, 228-29 (1991). Indeed, EchoStar is seeking a mere evidentiary presumption that terrestrial delivery is presumed to be impermissibly evasive unless proven otherwise by the party in custody of the information necessary for that proof. Such a presumption is, if anything, a lesser factual determination than, for example, a conclusion that the permanent storage of nuclear wastes does not have a "significant" environmental impact (see Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 100-01 (1983)); that occupational exposure to benzene presents a significant risk (see Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 652 (1980)); or that leaded gasoline emissions cause a significant risk of harm to public health (see Ethyl Corp. v. EPA, 541 F.2d 1, 20 (D.C. Cir), cert denied, 426 U.S. 941 (1976)).

[36] See EchoStar Comments at 15 n.27; RCN Telecom Services, Inc. at 15 ("[T]he Commission should consider whether its authority would allow it to extend the rules to all programming, regardless of its method of delivery.").

make the vendor whole, and evasion of the rules would be the only possible benefit from such terrestrial transmission.

EchoStar cautions the Commission to be wary of the arguments made by some commenters that terrestrial evasion of the program access rules is somehow necessary in order to allow exclusivity arrangements and thus protect programming that is in its nascent stages of development.[37] In fact, such arguments corroborate the evasive motives of these arrangements. Congress has carefully delineated the required showing and circumstances in which exclusivity arrangements are permissible. Affiliated vendors should not be allowed to redefine these circumstances. Similarly, the Commission should ignore claims that the absence of terrestrial evasion would hinder investment in cable programming. Congress has already accommodated the desire to encourage such investment to the degree it deemed necessary, through the exclusivity petition mechanism.

IV. CONCLUSION

For the foregoing reasons, the Commission must adopt the following rules to enhance the effectiveness of the program access complaint process: (1) discovery as of right in all program access complaint proceedings; (2) use of its preexisting authority to impose damages (calculated from the date of the violation) against cable programmers and cable operators found to violate the program access provisions and injure MVPD competitors; and (3) a presumption that the cable programmer's decision to provide its programming on a terrestrial basis is

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[37] See Comments of Cablevision Systems Corporation at 21.

primarily intended to evade the program access restrictions. With these rules in place, EchoStar firmly believes that the Commission will be sending a stern strong message to cable operators and programmers that it will not tolerate further violations of the program access rules.

Respectfully submitted,

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Dated: February 23, 1998

CERTIFICATE OF SERVICE

I, Marc A. Paul, hereby declare that the foregoing Reply Comments of EchoStar Communications Corporation was sent this 23rd day of February, 1998, by messenger (indicated by *) or first-class mail to the following:

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